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INC. and CLAUDIO SALOMONE,  
erroneously sued as CLAUDIO  
SALAMONE

UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JESUS I. MOLINA, individually and  
on behalf of all others similarly  
situated,

Plaintiffs,

vs.

CAFÉ RIO, INC., a UTAH  
corporation; CLAUDIO  
SALAMONE, an individual; and  
DOES 1 through 100, inclusive,

Defendants.

Case No. 5:12-CV-01858-JFW-SP

[Assigned to the Honorable John F.  
Walter, Courtroom 16]

**JOINT RULE 26(f) REPORT**

Date: December 3, 2012  
Time: 8:30 a.m.  
Courtroom: 16

26(f) Conference: November 15, 2012  
Time: 4:00 p.m.

Complaint Filed: June 20, 2012  
Date of Removal: October 25, 2012

Pursuant to Federal Rule of Civil Procedure 26(f), Central District of California Local Rule 26-1, and the Court's November 1, 2012 Order Setting Scheduling Conference, Plaintiff JESUS I. MOLINA ("Plaintiff") and Defendants CAFÉ RIO, INC. ("Café Rio") and CLAUDIO SALOMONE ("Defendant Salomone") (collectively, "Defendants"), by and through their respective counsel of record, hereby submit the following Joint Rule 26(f) Report.

Plaintiff filed this action on June 20, 2012 in the Superior Court for the County of San Bernadino, Case No. CIVDS1206445. On September 27, 2012, Defendant Café Rio filed its Answer to Plaintiff's Complaint. On October 24, 2012 Defendant Salomone filed his Answer to Plaintiff's Complaint. On October 25, 2012 Defendants removed this action to United States District Court for the Central District of California. Counsel for Plaintiff and Defendants have participated in a conference of parties pursuant to Rule 26(f) and Local Rule 26-1.

## I.

### **REQUIREMENTS OF COURT'S NOVEMBER 1, 2012 ORDER SETTING SCHEDULING CONFERENCE**

#### **1. Basis for Subject Matter Jurisdiction**

This action is a civil action over which this Court has original jurisdiction based on diversity of citizenship pursuant to 28 U.S.C. § 1332(a) as (1) the amount in controversy exceeds \$75,000 and (2) the Plaintiff, on one hand, and Defendant Salomone and Defendant Cafe Rio, on the other hand, are citizens of different states, specifically the State of Utah. No issues exist regarding personal jurisdiction or venue and all parties have been served.

#### **2. Statement of Facts**

Plaintiff maintains that Plaintiff Jesus Molina was hired as an hourly employee by Café Rio on or about January 15, 2011. Café Rio is a national chain of Mexican Restaurants with numerous locations in Southern California. While employed, Plaintiff was routinely denied rest breaks, meal breaks, overtime compensation,

1 minimum wage, reimbursement for necessary expenditures incurred in the  
2 discharge of his duties, as well as accurate itemized statements. Additionally,  
3 Plaintiff was often forced to work off the clock without compensation, and his time  
4 records were sometimes edited by management to misrepresent the total number of  
5 hours worked. On or about July 10, 2011 Plaintiff was constructively terminated  
6 after complaining about a restaurant manager leaving out open containers of food.  
7 Upon termination, Defendant failed to pay all wages due to Plaintiff. On June 20,  
8 2012 Plaintiff filed the Complaint giving rise to the current litigation alleging  
9 violations of the California Labor Code, Industrial Welfare Commission Wage  
10 Orders, and as well as other statutory violations. A complete list of the alleged  
11 violations can be found in Plaintiff's Complaint. Defendants deny and dispute all  
12 claims.

### 13 **3. Statement of Disputed Legal Points**

14 The legal arguments which support Plaintiff's position are laid out in Plaintiff's  
15 Complaint, which includes claims for failure to provide required meal periods;  
16 failure to provide required rest periods; failure to pay overtime compensation;  
17 failure to pay minimum wage; failure to pay all wages due to discharged of quitting  
18 employees, failure to maintain required records; failure to provide itemized  
19 statements to employees, failure to indemnify employers for necessary expenditures  
20 incurred in the discharge of duties; unlawful business practices; and a representative  
21 action for civil penalties. Defendants deny and dispute all claims.

22 Defendants maintain that, as alleged in his complaint, plaintiff Molina purports  
23 to represent "current and former non-exempt employees of [Cafe Rio], for a period  
24 of time within four (4) years preceding the filing of this action." Defendants  
25 contend that Plaintiff has a prima facie fatal conflict of interest with the class he  
26 purports to represent because Plaintiff was a manager with supervisory and  
27 managerial control over the employees and was responsible for enforcing California  
28 compliant company policies. Defendants' position is that Plaintiff cannot meet the

1 typicality and adequacy requirements necessary to maintain a class action, *inter*  
2 *alia*. See e.g., *First Am. Title Ins. Co. v. Superior Court*, 146 Cal. App. 4th 1564,  
3 1577 (2007) (“California law is clear that a representative plaintiff must be a  
4 member of the class he seeks to represent”); *Wal-Mart Stores, Inc. v. Dukes, et al.*,  
5 131 S. Ct. 2541, 2550 (2011) (citations and internal quotes omitted) (“a class  
6 representative must be part of the class and possess the same interest and suffer the  
7 same injury as the class members”); see also *Harris v. Wal-mart Stores, Inc.*, 613  
8 S.E.2d 322, 330 (N.C. Ct. App. 2005) (“class members who acted as supervisors”  
9 are “in direct conflict with the class members they supervised”). Defendants  
10 further contend that Plaintiff cannot maintain claims purportedly on behalf of others  
11 when he himself has suffered no injury with respect to the claims.

#### 12 **4. All Prior and Pending Motions**

13 Defendants filed a Notice of Removal on October 25, 2012. Plaintiff contends  
14 he has until Monday, November 26, 2012 to file a Motion to Remand pursuant to  
15 28 U.S.C. § 1447(c). Furthermore, Defendants anticipate filing a motion to strike  
16 class allegations disqualifying Molina as class representative and motion(s) for  
17 summary judgment/adjudication.

#### 18 **5. Amended Pleadings**

19 Plaintiff may amend his pleadings to add claims and additional representative  
20 depending on what new information is obtained during discovery and in response to  
21 the contentions of the Defendants as to the suitability of Mr. Molina to act as a class  
22 representative. Defendants do not currently intend to amend their responsive  
23 pleadings, but reserve the right to do so if necessary.

#### 24 **6. Initial Disclosures**

25 The Parties will exchange Initial Disclosures on December 14, 2012.

#### 26 **7. Discovery**

27 Plaintiff previously served Defendants with discovery prior to receiving  
28 Defendants’ Notice of Removal. Discovery has not yet occurred in this litigation.

1 Defendants have proposed bifurcating discovery with class discovery  
2 proceeding before merits discovery. Plaintiff is not opposed to bifurcating  
3 discovery, but disagrees as to the scope of permissible class discovery. At a  
4 minimum, Plaintiff maintains that in order to prepare for class certification Plaintiff  
5 will need (1) the punch data and payroll information for putative class members for  
6 the class period in its native format; (2) the class list and accompanying contact  
7 information for putative class members; (3) the depositions of Café Rio's PMK(s)  
8 and Claudio Salamone; and (4) all documents relating to Café Rio's time  
9 keeping/payroll policies and procedures. Defendants disagree with the scope of  
10 Plaintiff's proposed class discovery.

11 Defendants believe that bifurcation of discovery is appropriate and necessary.  
12 Defendants' position is that courts routinely bifurcate discovery in class actions as  
13 part of their power to govern the conduct of discovery proceedings. In such cases,  
14 at the precertification stage the "plaintiff must . . . establish the relevance" of any  
15 discovery "sought to class certification." *In re Apple and AT&TM Antitrust*  
16 *Litigation*, No. C-07-05152, 2010 U.S. Dist. LEXIS 39637, at \*7 (N.D. Cal. March  
17 26, 2010). "Merits discovery," in turn, will "begin[] if and once the Court certifie[s]  
18 the class." *See Juarez v. Jani-King of Cal, Inc.*, 273 F.R.D. 571, 576 (N.D. Cal.  
19 2011).

20 The general reasons for bifurcation include the fact that class and merits  
21 discovery address markedly different topics. Whereas "discovery into certification  
22 issues pertains to the requirements of Rule 23 and tests whether the claims and  
23 defenses are susceptible to class-wide proof," "discovery into the merits pertains to  
24 the strength or weaknesses of the claims or defenses and tests whether they are  
25 likely to succeed[.]" *See* Federal Judicial Center, Manual for Complex Litigation, §  
26 21.14 (4th ed. 2008) ("Manual") § 21.14 at 256. Thus, "[d]iscovery relevant only to  
27 the merits delays the certification and may ultimately be unnecessary." *Id.*; *see, e.g.*,  
28 *Embry v. Acer Am. Corp.*, No. C09-01808 JW (HRL), 2010 U.S. Dist. LEXIS

1 6866, at \*4 (N.D. Cal. Jan. 28, 2010) (discovery requests seeking information  
2 relevant only to the merits “should be deferred until the merits phase of the case”).

3 Even in cases where there is overlap between class and merits issues, there  
4 exists good cause to bifurcate. Courts commonly bifurcate discovery in class  
5 actions even in the absence of a bright-line distinction between class and merits  
6 discovery. *See, e.g., Embry*, 2010 U.S. Dist. LEXIS 6866 at \*4 (“The distinction  
7 between class and merits discovery in this case is not as clear-cut as [defendant]  
8 suggests . . . but that does not mean that there is no distinction at all”). In such  
9 cases, the Court’s “[a]ctive judicial supervision” may be invoked to guide the  
10 parties in “conduct[ing] controlled discovery into the ‘merits’” that is “limited to  
11 those aspects relevant to making the certification decision on an informed basis.”  
12 Fed. R. Civ. P. 23(c)(1)(A) (adv. comm. notes); *In re Apple and AT&TM Antitrust*  
13 *Litigation*, 2010 U.S. Dist. LEXIS 39637 at \*7 (denying motion to compel because  
14 “since the court bifurcated class certification and merits discovery, plaintiffs must”  
15 - and could not - “establish the relevance of the [evidence] sought to class  
16 certification”). Defendants’ contend that in this case, any overlap would be minimal  
17 and the reasons for bifurcation are particularly compelling.

18 **Class discovery.** At the class discovery phase, discovery may be limited to  
19 factual issues necessary to “test[] whether the claims and defenses are susceptible to  
20 class-wide proof.” *See* Manual, § 21.14 at 256. Defendants’ maintain that  
21 limitation should be implemented here for both fairness and efficiency. *See e.g.,*  
22 *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1313 (9th Cir. 1977) (holding that  
23 class certification was properly denied without discovery where plaintiffs could not  
24 make a prima facie showing of Rule 23’s prerequisites or that discovery measures  
25 were “likely to produce persuasive information substantiating the class action  
26 allegations”). Plaintiff disputes the factual applicability of *Doninger*, which  
27 involved a sex discrimination class action and dissimilar discovery requests to the  
28 case at hand. Accordingly, Plaintiff contends that discovery should not be limited

1 in this manner.

2 Defendants' position is that discovery should first be conducted regarding  
3 whether Plaintiff Molina is typical of the putative class members, and whether he is  
4 an adequate class representative. Those factual issues will revolve around the  
5 named plaintiff's role and supervisory authority over other employees as a  
6 manager. This discovery will include the deposition of Plaintiff and may include  
7 production of certain documents, as well as a deposition of a corporate  
8 representative of Cafe Rio to testify as to company policies and procedures.

9 Defendants' position is that only if Jesus Molina is found to be a typical and  
10 adequate class representative should class discovery proceed on a wider basis.  
11 Plaintiff's dispute this narrow understanding of discoverable evidence for  
12 determining class certification. In determining whether Mr. Molina's claims are  
13 sufficiently typical and common to support class certification, Plaintiff maintains  
14 that it is necessary to evaluate among other things, the time records and payroll  
15 records for putative class members for the class. Plaintiff maintains that only then  
16 can a court determine whether their exist sufficiently similar legal and factual issues  
17 to support class certification.

18 **Merits discovery.** After the conclusion of class discovery and issuance of the  
19 Court's order on class certification, further discovery, if appropriate, may be  
20 directed toward the merits question of whether defendants are liable for the claims  
21 alleged by plaintiff and the extent of damages

22 Defendants anticipate propounding interrogatories, requests for admissions,  
23 requests for production, and taking the deposition of Plaintiff during the class phase  
24 of discovery.

25 The Parties do not anticipate a need for a discovery cut-off during the class  
26 phase of discovery. The parties suggest having a scheduling conference subsequent  
27 to the hearing on the motion for class certification, motion to strike class  
28 allegations, or any similar motion to schedule merits discovery and dispositive



1 motion cutoffs.

2 The parties do not anticipate any discovery issues related to electronically stored  
3 information. However, Plaintiff requests that Defendants produce electronically  
4 stored information in its native format with metadata intact and issues may arise as  
5 to the scope of Plaintiff's requests.

6 **8. Related Cases**

7 Plaintiff previously filed a workers' compensation claim related to his  
8 employment with Cafe Rio.

9 **9. Relief Sought**

10 Plaintiff's requested relief is set forth in Plaintiff's Complaint. Plaintiff  
11 contends it is unable to determine the amount of class wide damages with  
12 specificity until discovery has been completed.

13 Defendants note that Plaintiff was provided with Plaintiff's time records prior to  
14 the commencement of this action and thus has had the necessary information in his  
15 possession to calculate any of his alleged damages, if any. Defendants expect that  
16 Plaintiff will produce such information in his initial disclosures as required by Rule  
17 26(a). Defendants contend that class wide damages will not be at issue in this  
18 matter following limited class discovery for the reasons discussed above, *inter alia*.  
19 Furthermore, Defendants seek a dismissal with prejudice of all claims and whatever  
20 additional allowed by law.

21 **10. Certification as to Interested Parties or Persons**

22 Pursuant to Local Rule 7.1-1 the Plaintiff will submit a Certification as to  
23 Interested Parties prior to the Scheduling Conference.

24 On October 25, 2102 and pursuant to Federal Rule 7.1 and Local Rule 7.1-1,  
25 Defendants certified that the following listed parties have a direct, pecuniary  
26 interest in the outcome of this case. Those representations were made to enable the  
27 Court to evaluate possible disqualification or recusal:

28 1. Jesus I. Molina, an individual, Plaintiff



2. Cafe Rio, Inc. a Utah Corporation, Defendant

3. Claudio Salomone, an individual, Defendant

**11. Discovery Cutoff, Motion Cutoff, Pretrial Conference, and Trial Date**

The Parties agree that a discovery cut off should not be determined until after the proposed scheduling conference which would occur after the motion for class certification, motion to strike class allegations, or any similar motion. The Parties feel that determining a trial date and pretrial conference is premature at this time.

**12. Jury Trial and Time Estimates**

The Parties agree to a Jury Trial. The Parties feel that estimating the length of trial at this time is premature until the Court rules on the motion for class certification, motion to strike class allegations, or any similar motion.

**13. Settlement Plan**

The Parties are not opposed to settlement and would be amenable to a private mediation; however, Plaintiff feels mediation is premature at this stage as discovery has not yet commenced. The Plaintiff will need the discovery requested above to fully evaluate the value of the claims. Defendants position is that this case is amenable to an early mediation and that much of the discovery requested by Plaintiff is not necessary for a mediation to go forward.

**14. Complex Status**

The Parties agree this case is sufficiently complex to benefit from reference to the procedures set forth in in the Manual on Complex Litigation.

**15. Dispositive Motions**

Defendants anticipate filing a motion to strike class allegations disqualifying Molina as class representative and motion(s) for summary judgment/adjudication.

**16. Unusual Legal Issues**

The Parties are not aware of any particularly unusual legal issues at this time.

**17. Proposals Regarding Severance and Bifurcation**

With the exception of bifurcation as it relates to discovery, the Parties do not

1 propose any other bifurcation at this time.

## 2 II.

### 3 LOCAL RULE 26-1 REQUIREMENTS

#### 4 **18. Complex Cases**

5 The Parties agree that this case is sufficiently complex to benefit from  
6 reference to the procedures set forth in in the Manual on Complex Litigation.

#### 7 **19. Motion Schedule**

8 Plaintiffs propose that the class certification motion be filed by August 9, 2013,  
9 that Defendants file their opposition by October 9, 2012, that Plaintiff's reply be  
10 due by November 20, 2013, and that the hearing occur on Monday, December 16,  
11 2013 at 1:30 p.m..

12 Defendants do not agree to this schedule and firmly believe that all motions,  
13 including the class certification motion, shall be filed in accordance with and  
14 subject to the applicable Federal Rules of Civil Procedure, Local Rules, and Judge's  
15 Rules.

16 The Parties agree that a Motion Schedule as to trial related issued would best be  
17 addressed at the proposed scheduling conference to occur after the motion for class  
18 certification, motion to strike class allegations, or any similar motion (as discussed  
19 in No. 7 above).

#### 20 **20. ADR**

21 The Parties are not opposed to settlement and would be amendable to a private  
22 mediation; however, Plaintiff feels mediation is premature at this stage as discovery  
23 has not yet commenced. Defendants' position is that this case is amenable to an  
24 early mediation and that much of the discovery requested by Plaintiff is not  
25 necessary for a mediation to go forward.

